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Supreme Court of the United States

October Term, 1976

No. 76-1406

LONA J. THORNTON,
GLEN E. MILLER,
Petitioners,

vs.

PERSONAL SERVICE INSURANCE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the above case on December 22, 1976 and the denial of the Motion for Rehearing entered on January 14, 1977.

OPINIONS BELOW

The judgment of the Common Pleas Court is unreported, but reproduced in the Appendix *infra*, p. A30.

The Decision of the Court of Appeals of Ohio is unreported but reproduced in the Appendix *infra*, p. A8.

The Opinion and Judgment of the Supreme Court of Ohio is reported at 48 Ohio St. 2d 306 and is reproduced in the Appendix *infra*, p. A2. Motion for Rehearing denied *infra*, p. A1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Is a decision of the Supreme Court of Ohio consistent with any rational administration of justice when the Supreme Court:

a. Ignores a surety's express written agreement to defend its principal?

b. Ignores a surety's obligation to act in good faith?

c. Ignores the jury and trial court and Court of Appeals findings of "bad faith"?

2. Was the Supreme Court of Ohio's reversal of the decision of the Court of Appeals and the trial court so gross an abuse of its discretion that it was inconsistent with any rational administration of justice?

3. Was the holding of the Supreme Court of Ohio which took away the Petitioners' judgments a violation of their constitutional right to due process of law?

CONSTITUTION, STATUTES AND RULE INVOLVED

Constitution of the United States, Amendment 14:

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code, Section 4509.45:

Section 4509.45. Proof of financial responsibility.

Proof of financial responsibility when required under sections 4507.41, 4509.32, 4509.33, 4509.34, 4509.38, 4509.40, 4509.42 or 4509.44 of the Revised Code may be given by filing any of the following:

(A) A certificate of insurance as provided in sections 4509.46 or 4509.47 of the Revised Code;

(B) A bond as provided in section 4509.59 of the Revised Code;

(C) A certificate of deposit of money or securities as provided in section 4509.62 of the Revised Code;

(D) A certificate of self-insurance, as provided in section 4509.72 of the Revised Code, supplemented by an agreement by the self-insurer that, with respect to accidents occurring while the cer-

tificate is in force, he will pay the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to the self-insurer. Such proof shall be filed and maintained for three years from the date of suspension of operating privileges by the registrar of motor vehicles.

Ohio Revised Code, Section 4509.59:

Section 4509.59. Proof of financial responsibility evidenced by bond.

Proof of financial responsibility may be evidenced by the bond of a surety company duly authorized to transact business within this state, or a bond with at least two individual sureties each owning real estate within this state, and together having equities equal in value to at least twice the amount of such bond; the real estate shall be scheduled in the bond approved by a judge of a court of record and the bond shall be conditioned for payment of the amount specified in section 4509.62 of the Revised Code. Such bond shall be filed with the registrar and shall not be cancelable except after ten days written notice to the registrar of motor vehicles.

Rule 19 of the Supreme Court of the United States:

Rule 19. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither con-

trolling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

STATEMENT OF THE CASE

This is a tort case of BAD FAITH arising out of a contract between Personal Service Insurance Company and its bondholder, Glen Miller.

Miller paid the Company a $500 premium for a Financial Responsibility Bond. In the Application (Exhibit 44) for the Bond (Plaintiffs' Exhibit 45) the Company expressly agreed to furnish a defense for Miller in any claim arising out of his use or operation of an automobile. The Company admitted, acknowledged and initially undertook Miller's defense by retaining attorneys for him, but on the day of the trial the Company wilfully and maliciously instructed Miller's attorney to abandon him. Miller was thus abandoned and paid for his own defense. The Supreme Court of Ohio irrationally held, on these concrete facts, that the Company owed no duty to Miller to defend and breached no duty to Miller.

Further, in the Application (Plaintiffs' Exhibit 44) the Company reserved the right to investigate, negotiate and settle any such auto claim against Miller. The Company undertook to do all of those things. Miller relied on the Company to thus act on his behalf. He trusted that the Company was his sole fiduciary, agent and representative in the processing and negotiation of that claim. The Company, instead of protecting Miller's interests, never notified him (for some 21 months) that a mere $10,000.00 would settle the very serious claim of Lona Thornton which was worth far in excess of $10,000.00. This "bad faith" of the Company directly precipitated the lawsuit and judgment against Miller in favor of Miss Thornton for $75,000.00. Again, irrationally, the Supreme Court of Ohio totally ignored this misconduct and held that the Company owed Miller nothing and breached no

duty to him and Miller (and/or his assignee, Lona Thornton) was thus left with a large excess judgment, arising through no fault of Miller's but arising entirely and only by reason of the Company's "bad faith" misconduct.

The following Chronology Outline sets forth the relevant dates and facts concerning this case which demonstrates the most flagrant "bad faith" misconduct ever demonstrated and proved in any reported case in the State of Ohio.

Chronology Outline

Prior to 9-30-67	Application for a Financial Responsibility Bond was signed by Glen E. Miller and the Bond was furnished by the Company. Miller paid the premium in full and the Bond was in full force and effect on 9-30-67.
9-30-67	Date of collision and injuries.
12-19-67	Correspondence from claims adjuster Frank Schnabel to Home Office of the Pioneer Mutual Casualty Co., reporting that original claim has evaluation "far in excess of the insurance company's exposure and every effort should be made to dispose of the case." (Plaintiffs' Exhibits 1 & 2; SR. 17-20.)
2-13-68	Correspondence from Frank Schnabel to Home Office, reporting that he has already received medical expenses in the amount of $6,197.30, the liability is clear and the case could not be successfully defended. (Plaintiffs' Exhibit 3; SR. 21, 22.)

9-26-68 Correspondence from Frank Schnabel to Anson B. Smith, President of Pioneer Mutual Casualty Co., reporting that the medical expenses have reached $9,092.30 and there will be additional medical expenses plus loss of income. Schnabel suggests settlement to the company. He further reports that Thornton's attorneys have demanded the Limit of the Bond.

(Plaintiffs' Exhibit 4; SR. 23, 24.)

11-22-68 Letter from Fred Weisman to the Ohio Department of Insurance complaining about Pioneer Mutual Casualty Company's refusal to settle.

(Plaintiffs' Exhibit 6; SR. 25, 26.)

11-29-68 Correspondence from the Ohio Department of Insurance to Pioneer Mutual Casualty Company asking for explanation of refusal to settle.

(Plaintiffs' Exhibit 7; SR. 27, 28.)

1-10-69 Correspondence from the Ohio Department of Insurance requesting a status report from the insurance company.

(Plaintiffs' Exhibit 10; SR. 29, 30.)

2-7-69 Second Letter from Department of Insurance to Company asking for status report. (Since no reply was received to January 10, 1969 correspondence.)

(Plaintiffs' Exhibit 11; SR. 31.)

3-5-69 Answer from the insurance company to the Ohio Department of Insurance alleging that Frank Schnabel was still investigating.

(Plaintiffs' Exhibit 12; SR. 32.)

7-1-69 "Bad Faith letter" to (defendant) Personal Service Insurance Company (Formerly Pioneer). (Which was neither acknowledged nor answered.)

(Plaintiffs' Exhibit 16; SR. 34, 35.)

8-18-69 Petition filed in Lorain County; Lona J. Thornton, A Minor, et al. v. Roger Logan and Glen Miller. Case No. 73613.

5-4-70 Correspondence within the insurance company reporting that Fred Weisman feels that the company's attitude in ignoring its obligation to pay its $10,000.00 bond, in a case of absolute liability, is bad faith. "This is a serious case and needs to be further considered by the company."

(Plaintiffs' Exhibit 13; SR. 33.)

2-4-71 Date trial originally scheduled in case no. 1. Insurance Company tendered $10,000 into court. Plaintiffs refused to sign release, wanted trial. Company ordered defense counsel to abandon Glen Miller forthwith.

2-11-71 Original trial began Miller hired new counsel.

2-16-71 Judgment in favor of plaintiff, Lona J. Thornton, $75,000.00 (and co-plaintiff, Betty Thornton, Mother, $10,000.00).

1-6-72 Complaint filed in Case No. 2 for "Bad Faith": Lona J. Thornton & Glen E. Miller v. The Personal Service Insurance Co., A Corp. Formerly Known as The Pioneer Mutual Casualty Co. of Ohio. Case No. 75831-72.

8-13-74 Trial began.

8-27-74 Judgment in favor of:

Lona Thornton for:

Compensatory Damages	$10,000.00
Punitive Damages	$55,000.00

Glen Miller for:

Compensatory Damages	$ 3,500.00

(Appellant's Appendix, pp. 50-51; 52, 53.)

Court of Appeals Modified Judgments as follows:

Lona Thornton for:

Compensatory Damages	$65,000.00
Punitive Damages	Zero

Glen Miller for:

Compensatory Damages	$ 3,500.00

(Appellant's Appendix, pp. 47-48.)

12-22-76 Opinion of the Supreme Court of Ohio reversing the Judgment of the Court of Appeals.

1-4-77 Motion for Rehearing denying Appellees and Cross-Appellants Motion for Rehearing.

There were thus two (2) separate lawsuits and trials that were factually involved in the background of this appeal:

1. The first was the lawsuit and trial for the negligent use and operation of the automobile by the then defendant, Glen E. Miller, that produced permanent and irreversible injuries to Lona J. Thornton on September 30, 1967. (Trial of February 16, 1971—See Chronology Outline, *supra.*)

2. The second lawsuit and trial and the one from which the present Appeal and Cross-Appeal is made to this Supreme Court was the "Bad Faith" lawsuit, filed on January 6, 1972, wherein Glen E. Miller and Lona J. Thornton joined as plaintiffs against the Defendant-Appellant, Personal Service Insurance Company, essentially because of the "Bad Faith" misconduct of the Insurance Company towards Miller in failing to notify Miller or settle the original claim of Miss Thornton for a mere $10,000.00. The direct result of this "bad faith" failure to settle was a $75,000.00 verdict and judgment against Miller. Thus, the tortious failure to settle produced a $65,000.00 debt in favor of Miss Thornton that Miller would never have been subjected to if the company had, in good faith, settled the claim for the $10,000.00—during the many months that it had the opportunity to do so. (Trial of August 13, 1974 and judgment of August 27, 1974—See Chronology Outline, *supra.*)

The facts which were the basis of the jury's finding of "Bad Faith" and of the Court of Appeals affirming those findings are important in an understanding of this case. The most relevant of those facts is that the Financial Responsibility Bond issued to Miller by the Insurance Com-

pany pursuant to an application (Bond Provision VIII of Plaintiffs' Exhibit 44; Tr. 1182; R. 129) and the Bond itself (Plaintiffs' Exhibit 43; Tr. 1182, R. 127) constituted a Contract between Miller and the Insurance Company which expressly imposed certain duties upon and gave certain rights to the Insurance Company, as follows:

a. The duty to defend Glen Miller.

b. The right to negotiate any claim against Glen Miller.

c. The right to settle any claim against Glen Miller.

The Personal Service Insurance Company did deposit in Court at the time of trial in February, 1971, the sum of $10,000.00. The Company asserts that the making of this deposit excuses its prior failures to settle for almost 2 1/2 years before this deposit was made. For the period from September 30, 1967 to July, 1969 (a period of 21 months) this Company was repeatedly and continuously given the opportunity to close this claim against Glen E. Miller (or invite him to close it) for the mere $10,000.00 amount (See Chronology Outline, *supra*). The following are the proven adjudicated and *admitted* facts concerning the "Bad Faith" of this Company:

1. From September, 1967 to January, 1971 (the date of original trial) the defendant-Company dealt on behalf of Glen Miller in processing the claim. The Company thus assumed and undertook its right to process and negotiate the claim against Miller as his trusted fiduciary.

2. This defendant-Company and *only this defendant-Company* engaged in "settlement talk" or negotiations on his behalf. The Company maintained the only line of communication between the adverse parties:

Miller and the Thortons. This defendant-Company failed to settle or to notify Miller of the opportunity to settle at any time during the 21-month period from September, 1967 to July 1, 1969 which is when the "bad faith" letter expressed the final demand and opportunity to settle.

3. Continued during this entire time to expose Miller to a lawsuit and judgment far in excess of the $10,000.00 amount which the Company could have and should have settled if they were simply acting in good faith to Miller. (As to whether the Company or Miller actually paid it is totally immaterial.)

4. During all of these 21 months the Company never even gave *notice* to Miller of the fact that the claim could be settled for only $10,000.00.

5. The Company or Surety not only ignored claimant's offers to settle, not only failed to provide its insured or bondholder with "good faith" negotiations, not only failed to make any offer when it knew Miller was exposed to legal attack and ultimate judgment far in excess of $10,000.00, not only failed to even notify him as to what was going on with negotiations, but ultimately went to the extent of abandoning him in the courtroom by withdrawing the lawyer they had hired (and whom Miller relied upon) to defend him.

Complaint was filed in the Lorain County Common Pleas Court on August 18, 1969 for the injuries to Lona Thornton (and for her Mother, Betty's medical expenses). This case is entitled: Lona J. Thornton, a minor, et al. v. Roger Logan, et al. being Case No. 73613 on the Court's Docket. This action proceeded to trial on Febraury 11, 1971—the defendant Personal Service Insurance Company having ignored the "Bad Faith" letter of July 1, 1971, and

in fact never discussed the settlement and never offered a "plugged nickel" until January of 1971. The trial, as stated, commenced on or about February 11, 1971 and on February 16, 1971, verdict and judgment were rendered for Lona Thornton in the sum of $75,000.00 (and for Mother Betty Thornton the sum of $10,000.00). The $10,000.00 deposited in Court at trial time was applied to Lona Thornton's judgment, this leaving a balance due on Lona's judgment in the sum of $65,000.00 (See Chronology Outline, *supra*).

Lona J. Thornton and Glen E. Miller joined as plaintiffs and thus jointly commenced the "bad faith" action against Personal Service Insurance Company (Case No. 75831-72), for its failure to settle (the rights of Miller for the failure to settle having been assigned to Lona J. Thornton); and Miller individually asserted his own claim for the company's wilfully withdrawing Miller's counsel from his defense on the very day of trial (See Chronology Outline, *supra*).

The trial, which began August 13, 1974, resulted in a jury verdict for Lona J. Thornton in the amount of $10,000.00 as compensatory damages; and in the amount of $55,000.00 as punitive damages. Further, there was a verdict in the amount of $3,500.00 in favor of Glen E. Miller for attorney fees incurred by him for his defense.

Appeal was thereafter taken by the Personal Service Insurance Company to the Court of Appeals for the Ninth Judicial District. Lona J. Thornton and Glen E. Miller Cross-Appealed on the basis that the $10,000.00 awarded by the jury as compensatory damages was error since the compensatory damages as a matter of law were $65,000.00, being the precise balance due from Glen Miller to Lona J. Thornton on the original $75,000.00 judgment against him and in her favor. The Court of Appeals thus held

that, as a matter of law, Lona Thornton was properly entitled to compensatory damages in the sum of $65,000.00 and not $10,000.00. The Court of Appeals has thus decided that Plaintiffs-Appellees' Cross-Appeal was well taken. Accordingly the Court modified the judgment by adjusting the compensatory damage award to $65,000.00, in lieu of the jury award of $10,000.00 compensatory damages and $55,000.00 punitive damages. The $3,500.00 award to Glen E. Miller was also affirmed.

Notices of Appeal and of Cross-Appeal were filed and the Supreme Court of Ohio heard this case upon the merits. On December 22, 1976, the Supreme Court of Ohio issued its *per curiam* opinion and decision (Appendix p. A2). The Court held that:

> "Inasmuch as the underlying purpose of a financial responsibility bond is to protect the public and not to save harmless the principal, it follows that, not withstanding the provisions for defense and settlement contained in the agreement herein between the surety and principal, the surety's liability extended only to the limits of the bond. When Appellant paid the amount of the bond into the Court, it discharged its liability to the injured party and its duty to the principal, and therefore, it is not liable beyond that amount for failure to settle or defend."

The Supreme Court of Ohio thus rendered judgment reversing the Court of Appeals (Appendix p. A2). Petitioners' Motion for Rehearing was denied on January 14, 1977. It is from these orders of the Supreme Court of Ohio that relief is sought by this petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Gross Errors and Omissions of the Ohio Supreme Court Were So Flagrant and Capricious That Its Decision and Opinion Are Incompatible With Any Rational Administration of Justice. Petitioners Have Thereby Been Deprived of Their Property (Judgment for Money Damages) Without Due Process of Law.

The glaring omission by the Ohio Supreme Court to so much as acknowledge the obvious "bad faith" fact situation before the Court was not mere error, but an approach or conduct of the Court so grossly wrong as to be inconsistent with and "impossible" in any rational administration of justice. The decision works a fundamental deprivation of Petitioners' rights to substantial justice, due process and their right to fundamental considerations of express contract (the duty to defend) and implied contract (good faith).

In *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 37 Sup. Ct. 392 (1917), Mr. Justice Holmes stated "whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been . . ." If this mistake is so gross as to be impossible in a rational administration of justice it is a denial of constitutional rights.

The action of the Ohio Supreme Court in this case is far more than mere error of interpretation of various sections of the Financial Responsibility Act of Ohio, Ohio Revised Code Sections 4509.45 and 4509.59. The Supreme Court of Ohio stated in its per curiam opinion:

> "Inasmuch as the underlying purpose of a financial responsibility bond is to protect the public and not to save harmless the principal, it follows that, *notwithstanding the provisions for defense and settlement contained in the agreement herein between the surety and principal*, the surety's liability extended only to the limits of the bond. When appellant paid the amount of the bond into Court, it discharged its liability to the injured party and its duty to the principal and, therefore, it is not liable beyond that amount for failure to settle or defend."

This reasoning is impossible. The Company *undertook the negotiations and settlement of the claim against Glenn Miller* as the fiduciary and agent of Miller; *severely prejudiced Miller with lack of any notice* for 21 months that the claim could be closed for a mere $10,000.00 though the claim was clearly worth far in excess of that amount; and finally, the Company *intentionally ordered Miller's attorney to abandon Miller* on the very day of trial. In the face of these most appalling acts of "bad faith", the wilful failure to defend as promised, and the wilful interference with Miller's attorney-client relationship, the Ohio Supreme Court declared that there was *no duty to Miller to act in good faith, no duty to defend him, and no wrong done to him.* The Ohio Supreme Court seems oblivious to the glaring wrong of "bad faith" that was committed by the Company to Miller in precluding Miller from settling the case (whether by the Company's payment or by his own payment of a mere $10,000.00).

Throughout this case the Company admitted it owed Miller "good faith". The jury, the trial court and the Court of Appeals found that the Company acted in "bad faith". This case reeks of "bad faith". Yet the Supreme Court of Ohio (as if everything below somehow disappeared), seems to have abandoned its responsibility as a judicial tribunal, and did not mention or even consider

"bad faith" in its decision. The phrase "bad faith" appears nowhere in the decision. There has been a terrible judicial omission and failure, and a clear abuse of discretion by the Ohio Supreme Court to acknowledge the central issue of this case: "Bad Faith". This abuse is so gross as to be "impossible" in a rational administration of justice. Mr. Justice Herbert of the Ohio Supreme Court stated in his dissenting opinion (in which Mr. Justice Celebrezze concurred):

> "Since the law is as the majority says, there was no need for appellant, in exchange for money paid to it by Miller, to promise to defend 'any suit against [Miller] * * * even if such suit is groundless, false or fraudulent.' *However, such a bargain was struck between appellant and appellees' assignor and I see no justification for ignoring that fact. I would affirm.*" (Emphasis added.)

The Ohio Supreme Court wrenched a verdict and judgment from a crippled assignee (Lona Thornton) and from a defrauded assignor (Miller) when the Supreme Court of Ohio ignored the plain and admitted terms of the contract, the facts determined by a duly impaneled jury, and the judgments of the courts below. Surely the Supreme Court of Ohio ordinarily has the right and discretion to reverse any court below, but even the Supreme Court of Ohio ought not act capriciously, ignoring basic facts, and abandoning time-honored and reason-honored principles of fundamental justice. The Supreme Court of Ohio disposed of this case arbitrarily, without reason or rationale, and this is and ought to now be declared a violation of the 14th Amendment of the United States Constitution because this utter disregard by the Court has damaged the Petitioners and precluded them from their judgments contrary to the due process of the law.

The Supreme Court of the United States has granted certiorari in cases where a state Supreme Court's decision was so totally devoid of evidentiary support as to render the decision unconstitutional under the due process clause of the 14th Amendment of the Constitution of the United States. *Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Washington v. United States,* 357 U.S. 398. In these cases certiorari was allowed for the reason that the decision represented a gross miscarriage of justice or a subtle erosion of a statutory or legal principle. These cited cases are criminal cases. They stand for the proposition that the United States Supreme Court will review a criminal case wherein a defendant is convicted without evidence because this is violative of due process. The same principle should apply to a civil decision. Not because of the mere money damages involved, but because of the threat to the public in the frivolous usurpations of power by a Court to the detriment of people. The *only* opportunity to correct this particular court —usurpation of power which produced this gross miscarriage of justice is now.

II. Substantial Federal Questions Are Presented.

In exercising its power to control and regulate travel on the public highways of the State of Ohio, the Ohio State legislature enacted Ohio Revised Code, Sections 4509.45 and 4509.59. These sections provide for the furnishing of a Financial Responsibility Bond as an alternative method of establishing security or collectibility for discharging one's liability in damages for the operation of a motor vehicle. 60 C.J.S., *Motor Vehicles,* Section 10.

Similar Financial Responsibility Bond statutes have been enacted throughout the United States, including the heavily populated States of California, Illinois, Michigan,

New York, Pennsylvania, Texas, Wisconsin and many others. Only those just listed are cited below:

West's Annotated California Codes, Vol. 66A Vehicle Code, Section 16434 at page 53.

Smith-Hurd Illinois Annotated Statutes, Chapter 95 1/2, Section 9-320 at page 358.

Michigan Compiled Laws Annotated, Volume 13, Motor Vehicles, Section 257.523, at page 297.

McKinney's Consolidated Laws of New York Annotated, Book 62A, Vehicle and Traffic Law, Sections 311 (6) and 349 (e) and (f).

Purdoon's Penna. Statutes Annotated, Title 75.

Vernon's Civil Statutes of the State of Texas, Annotated, Vol. 19 1/2, Article 6701 h, Section 24 at page 608.

West's Wisconsin Statutes Annotated, Vol. 39A, Vehicle Code, Section 344.15 at page 322.

Statutes concerning Financial Responsibility Bonds (and thus the rights and duties of sureties and principals who, respectively, sell and purchase these bonds) are of widespread national interest. The decision in this case will apply to sureties and principals in every major city in all of the States of the United States. This is, therefore, a matter of great general interest to motorists in our nation. Further, because of the Court's conduct and manner of decision it is of great interest to every person in this land. When there is a doubtful determination of a substantial or important question, this Court has granted certiorari. *Williams v. Lee*, 358 U.S. 217.

III. The United States Supreme Court May Grant Certiorari by Exercising Its Power of Supervision.

United States Supreme Court Rule 19 indicates the character of reasons which this Court may consider in determining whether to grant a review on a Petition for Certiorari. The relevant reason for granting certiorari here is stated in Rule 19 (1) (b) which provides that Certiorari may be allowed if the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 19 (2) further states: "The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of . . ., any other Court whose determinations are by law reviewable on writ of certiorari." The irrationality of the decision in this case calls for an exercise of this power of supervision over the Ohio Supreme Court.

IV. The Petitioner's Constitutional Rights to Due Process Were Denied by the Supreme Court of Ohio.

Petitioners had no opportunity prior to Motion for Rehearing to challenge the taking of their property without due process of law. Ohio Revised Code, Sections 4509.45 and 4509.59, of the Ohio Financial Responsibility Act had never been so interpreted as to take property from them. Only when the Supreme Court of Ohio provided its novel interpretation of these sections of the Act were Petitioners made aware that the subject Act had, *as interpreted*, the effect of obliterating their obvious contractual rights to defense and good faith in negotiations and in settlement.

A review of the Act (especially Ohio Revised Code, Section 4509.45 and Ohio Revised Code, Section 4509.59) reveals that there is no limitation upon what the surety may provide for the principal in exchange for his premium. Nowhere does it state, for example, that the "bond" is the maximum the surety is permitted to furnish for the principal. The Act establishes a minimum that the surety must provide. In this case the surety went further. The surety promised and contracted to defend the principal. The surety further reserved to itself the power to negotiate and to settle. Glen Miller paid them $500.00 for the bond *and the additional agreements*. The surety recognized the agreement, and initially provided Glen Miller with his defense and negotiated for Miller, but in utter bad faith. The Supreme Court of Ohio now seems to hold that the Financial Responsibility Act precludes or otherwise disposes of an agreement or contract to defend, and abrogates all other usual duties of the surety, including its implied in law obligation to act in good faith. This concept was never even suggested or argued by the defense in this case. On the contrary, it was actually specifically stipulated by defense counsel, that the surety owed Miller a defense and owed Miller good faith.

When a Constitutional privilege (due process) has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a Motion for Rehearing and that is timely. Petitioners challenged this ruling by Motion for Rehearing; having failed, Petitioners now seek a granting of their Petition for Certiorari. *Missouri v. Genner*, 281 U.S. 313; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

CONCLUSION

The Supreme Court of Ohio has deprived Petitioners of their judgments without due process of law. The Court, in reversing the jury verdicts and judgments for damages which were affirmed by a Court of Appeals of Ohio, committed errors and omissions so gross and flagrant that its decision is incompatible with, and is essentially impossible under, any rational administration of justice.

Petitioners urge the Court to grant their petition for a Writ of Certiorari to review the decision of the Ohio Supreme Court in this case. Such a grant under this Court's power of supervision will permit this Court to correct a most serious failure of due process and devastating injustice to the Petitioners.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION FOR REHEARING

(Dated January 14, 1977)

No. 75-900

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

LONA J. THORNTON *et al.*,
Appellees and Cross-Appellants.

VS.

PERSONAL SERVICE INSURANCE CO.,
Appellant and Cross-Appellee.

It is ordered by the court that rehearing in this case is denied.

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 22, 1976)

No. 75-900

THE SUPREME COURT OF THE STATE OF OHIO

LONA J. THORNTON *et al.*,
Appellees and Cross-Appellants,

vs.

PERSONAL SERVICE INSURANCE CO.,
Appellant and Cross-Appellee.

Plaintiffs Lona J. Thornton and Glen E. Miller, appellees herein, filed an action, in 1972, against defendant-appellant, Personal Service Insurance Company (formerly Pioneer Mutual Casualty Co.), in the Court of Common Pleas of Lorain County, praying for damages for an alleged failure of appellant to settle a personal injury claim and failure to provide legal defense with respect to the claim.

The personal injury claim arose in 1967 when Thornton sustained serious injuries as the result of an automobile collision. Miller owned, and was a passenger in, the vehicle which collided with the vehicle in which Thornton was a passenger. At the time of the collision, Miller's car was operated by one Roger M. Logan and was driven on the wrong side of the road. Miller was then the principal, and appellant the surety, under a financial responsibility bond in the amount of $10,000 issued by appellant. As to settlement and defense of claims against the principal, the contract provided:

"VIII. As respects such coverage as is afforded by the Financial Responsibility Bond, the Surety shall (a) Defend in the Principal's name and behalf any suit against the Principal, alleging such injury or destruction and seeking damages on account thereof even if such suit is groundless, false or fraudulent; but the Surety shall have the right to make such investigation, negotiation, and settlement of any claim or suit as may be deemed expedient by the Surety; (b) pay all premiums on appeal bonds required in any such defendant suit, but without any obligation to apply for or furnish such bonds; and expenses incurred by the Principal, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident. The Surety agrees to pay the amounts incurred under this paragraph, except settlements of claims or suits, in addition to the applicable limit of liability of the bond."

Although it was apparent soon after the collision that Thornton's injuries and medical expenses were substantial and that the driver of Miller's car had no insurance coverage, appellant refused demands by Thornton's counsel for payment of the full amount of the bond. In 1969, Thornton and her mother filed an action against Mary Jane Halada, Logan and Miller for $200,000 in damages, and appellant provided counsel who filed an answer in the cause. On the day set for trial, appellant paid $10,000 into court and withdrew its counsel. Miller then retained counsel for himself. The trial resulted in a jury verdict for Lona J. Thornton for $75,000 against Logan and Miller. Miller thereafter assigned his rights "to any and all claims that he * * * had * * * against * * * [appellant]" for "failing to settle * * * prior to lawsuit and/ or prior to final judgment" in consideration of Thornton's agreement not to attempt to collect the amount of the judgment entered against him.

In the instant cause, judgment was rendered against appellant in favor of Lona J. Thornton in the amount of $10,000 compensatory damages and $55,000 punitive damages, and in favor of Glen E. Miller in the amount of $3,500.

Upon appeal and cross-appeal to the Court of Appeals, that court held as follows:

"We find, as a matter of law, that plaintiff [Thornton] was entitled, under the circumstances to compensatory damages in the sum of $65,000. The jury awarded $10,000 compensatory damages and $55,000 punitive damages. We are of the further opinion that the plaintiffs-appellees' cross-appeal is well taken to the extent that the judgment must be modified to conform to the facts. We, therefore, modify the judgment to read $65,000 compensatory damages, in lieu of the jury award of $10,000 compensatory damages and $55,000 punitive damages.

"The judgment is modified, and affirmed as modified."

Appellant appealed to this court from that judgment and appellees filed a cross-appeal contesting the action of the Court of Appeals modifying the judgment to provide only for compensatory damages.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Weisman, Goldberg & Weisman Co., L. P. A., and *Mr. Fred Weisman*, for appellees and cross-appellants.

Messrs. Cronquist, Smith & Marshall and *Mr. Jack F. Smith*, for appellant and cross-appellee.

Per Curiam. The determinative issue in this cause is whether appellant is liable for its failure to settle and

to provide defense in the action filed by appellee Thornton against appellee Miller.

In finding such liability, the Court of Appeals reasoned:

"The provision for a financial responsibility bond is contained in R. C. 4509.45 and R. C. 4509.59. In its brief, appellant urges the argument that, 'A bond does not insure the principal against liability nor does it agree to indemnify him against loss.' As far as this argument goes, it is true. But as the appellant concedes * * * in its brief the financial responsibility bond is an agreement and two of the parties to that agreement are the appellant and Glen E. Miller.

"* * *

"This case revolves around the interpretation of * * * [the clause of the agreement relating to the duty of the surety to defend and settle]. The appellant obligates itself to defend its principal and reserves to itself the right to make settlements. These obligations are substantive and impose duties on the appellant. Whether these duties extend beyond the duties which appellant would have as a result of the existence of the Financial Responsibility Bond under the statute in the absence of Clause VIII * * * is not an issue * * *."

Subsequent to the decision of the Court of Appeals in this cause, this court, in *Republic-Franklin Ins. Co. v. Progressive Cas. Ins. Co.* (1976), 45 Ohio St. 2d 93, 341 N. E. 2d 600, had before it the question whether a financial responsibility bond constituted liability insurance. Concluding that it did not, the court, at page 95, stated:

"Throughout R. C. Chapter 4509 the dissimilarity of a financial responsibility bond and liability insurance is apparent.

"A liability insurance policy is written for the protection of the insured. However, a financial responsibility bond does not protect the principal by insuring him against liability. A financial responsibility bond is written for the protection of the motoring public, who may be injured by the principal. If the surety is compelled to make payment for damages caused by the principal, it has the right to seek reimbursement from the principal. The Progressive financial responsibility bond, in the present case, expressly provides for reimbursement by the principal. This fundamental difference between insurance and a financial responsibility bond compels this court to find that a financial responsibility bond is not insurance, as that term is used in Republic-Franklin pro-rata provisions."

It follows from the foregoing that the purpose of a financial responsibility bond is not to benefit the principal. This concept was recognized in *Ferguson v. Employers Mut. Cas. Co.* (1970), 254 S. C. 235, 242, 174 S. E. 2d 768, wherein the Supreme Court of South Carolina observed:

"The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by the negligence of financially irresponsible motorists. Its purpose is not like that of ordinary liability insurance to save harmless the *tort feasor* himself. The injured person's rights against the insurer are not derived through the insured as in the case of voluntary insurance. * * *"

Inasmuch as the underlying purpose of a financial responsibility bond is to protect the public and not to save

harmless the principal, it follows that, notwithstanding the provisions for defense and settlement contained in the agreement herein between the surety and principal, the surety's liability extended only to the limits of the bond. When appellant paid the amount of the bond into court, it discharged its liability to the injured party and its duty to the principal and, therefore, it is not liable beyond that amount for failure to settle or defend.

The judgment of the Court of Appeals is reversed.

Judgment reversed.

O'NEILL, *C. J.*, CORRIGAN, STERN, W. BROWN and P. BROWN, *JJ.*, concur.

HERBERT and CELEBREZZE, *JJ.*, dissent.

HERBERT, *J.*, dissenting. Since the law is as the majority says, there was no need for appellant, in exchange for money paid to it by Miller, to promise to defend "any suit against [Miller] * * * even if such suit is groundless, false or fraudulent." However, such a bargain was struck between appellant and appellees' assignor and I see no justification for ignoring that fact. I would affirm.

CELEBREZZE, *J.*, concurs in the foregoing dissenting opinion.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS

(Dated July 30, 1975)

Case No. 2256

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LONA J. THORNTON, *et al.*,
Plaintiffs-Appellees,

vs.

PERSONAL SERVICE INS. CO.,
Defendant-Appellant.

This cause came on to be heard the 21st day of April, 1975, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. Each assignment of error was reviewed by the court and, upon review, the following disposition made:

BRENNEMAN, J.

On September 30, 1967, the plaintiff-appellee, Lona J. Thornton, was seriously injured while riding as a passenger in a Volkswagen, which was struck head-on by an automobile owned by plaintiff-appellee, Glen E. Miller, being driven on the wrong side of the road by Roger Logan. Miller was riding as a passenger in his own car at the time of the accident. Lona J. Thornton was hospitalized and required extensive medical treatment. At the time, Miller had a financial responsibility bond issued

by the defendant-appellant, Personal Service Insurance Co., (Personal Service) formerly Pioneer Mutual Casualty Co. of Ohio, in the amount of $10,000. Personal Service conducted an investigation to determine the extent of liability of their bond holder. As early as December 19, 1967, Personal Service was informed of the extensive injuries to Lona J. Thornton in a letter from Frank Schnabel, their employee. In part, the letter reads:

> "Having been confined to a hospital for 84 days and being in the Intensive Care Unit for a considerable period of time, I would gather that her hospital bill should be in excess of $3,500, probably closer to $5,000 plus the numerous doctors charges who have performed surgery and been brought in for consultation. It would appear that this claim will have an evaluation far in excess of our exposure * * *."

On February 13, 1968, Frank Schnabel informed his company that:

> "It is also apparent from our investigation that there is no other insurance on behalf of our driver, Mickey Logan, and/or Mary Jane Halada who signed Logan's application for a driver's license."

In May of 1968, Lona J. Thornton's attorney made demand on the defendant for payment of the full obligation of the bond. In a letter dated May 16, 1968, a Mr. Blum of the defendant's home office reported to Frank Schnabel that an attorney had visited him and discussed the case. He concludes his letter with this statement:

> "It appears that Mr. Weisman does not intend to accept anything less than the policy limits in this case."

The defendant thereafter received proof of medical payments totalling over $9,000 and still made no offer to settle. Finally, the plaintiff's attorney wrote the Ohio State Department of Insurance. At this point, the defendant misled the insurance department.

During the next year, there were communications between plaintiff's attorney and the defendant. On July 1, 1969, not having received a satisfactory answer to his demands, Lona Thornton's attorney, Fred Weisman, submitted an ultimatum to the defendant demandiing payment of the $10,000 bond limit. He received no response and thereupon commenced the law suit against Glen E. Miller and the driver of the automobile, Roger Logan. As late as January 21, 1971, two weeks before the trial, the records of the defendant indicate that no offer was ever made to the plaintiff to settle. The defendant denies this and claims that an offer was made.

In August of 1969, Lona J. Thornton filed suit against Roger Logan and Glen Miller to recover $200,000 in damages resulting from the accident. In accordance with paragraph VIII of the Financial Responsibility Bond and the application therefor, the defendant undertook to provide a defense for Glen Miller. It provided an attorney who filed an answer and went with Glen Miller to a deposition. On February 4, 1971, the day on which trial was to begin, without consulting or advising him in advance, the defendant paid $10,000 into court, even though the defendant was aware the plaintiff, Lona Thornton, would not accept the money in settlement at that time. The attorney retained by the defendant company then withdrew from the case and left Miller without counsel. Miller later retained another attorney to represent him. The trial was had, and the jury returned a verdict in favor

of Lona Thornton for $75,000 of which $10,000 was satisfied by the payment into court made by the defendant. Miller executed an assignment to Lona Thornton of his right to proceed against the company for its failure to settle, in return for her agreement not to pursue the judgment against him. Thus, the present action was commenced.

Two claims are made in this case. Plaintiff, Lona Thornton, as assignee of Glen E. Miller claims that defendant failed to protect the interests of its bond holder by refusing to settle her personal injury claim for the entire amount of its obligation. She asserts that this failure was the result of the violation of the defendant's duty to protect the interests of its bond holder, and that this violation of duty was done in bad faith entitling her, as assignee, to collect damages to the extent that her assignor was damaged.

Appellee, Glen Miller, claims that the defendant-appellant had a duty to defend him and the breach of this duty caused him damages for which he is entitled to recover. The primary issue raised by the appellant is whether a financial responsibility bond creates the duties which the appellees claim have been breached by Personal Services Insurance Company.

The provision for a financial responsibility bond is contained in R.C. 4509.45 and R.C. 4509.59. In its brief, appellant urges the argument that, "A bond does not insure the principal against liability nor does it agree to indemnify him against loss." As far as this argument goes, it is true. But, as the appellant concedes in the preceding sentence in its brief the financial responsibility bond is an agreement and two of the parties to that agreement are the appellant and Glen E. Miller. In *Fleming*

v. Parsons, 2 Ohio App. 2d 12 (1965) the Court of Appeals for Fairfield County said:

> "The Pioneer Financial Responsibility Bond is a contract. As such it may be, in legal effect insurance."

The court here is not saying that for all purposes the bond is an insurance policy, but only insofar as its contractual provisions make it analogous to an insurance policy. The court continued:

> "The Pioneer contract fits that definition (of insurance). It indemnifies this judgment creditor as much as Buckeye or any other standard automobile insurance. Pioneer is liable under it direct to this judgment creditor. Pioneer like Buckeye has no right to reimbursement against the tort-feasor or its estate. Pioneer like Buckeye cannot defend on the ground of insolvency of the tort feasor or its estate. Both Pioneer and Buckeye must qualify under the same sections of the Revised Code (Chapter 3929) to do Ohio business." *Fleming v. Parsons, supra* p. 13.

The court held that in the particular situation with which it was confronted, the Financial Responsibility Bond was a contract which should be treated like an insurance contract.

In the instant case, the policy provision with which we are concerned reads:

> "VIII. As respects such coverage as is afforded by the Financial Responsibility Bond, the Surety shall (a) Defend in the Principal's name and behalf any suit against the Principal, alleging such injury or destruction and seeking damages on account thereof even if such suit is groundless, false or fraudulent; but

> the Surety shall have the right to make such investigation, negotiation, and settlement of any claim or suit as may be deemed expedient by the Surety; (b) pay all premiums on appeal bonds required in any such defendant suit, but without any obligation to apply for or furnish such bonds; and expenses incurred by the Principal, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident. The Surety agrees to pay the amounts incurred under this paragraph, except settlements of claims or suits, in addition to the applicable limit of liability of the bond." (Plaintiff's Exhibit 44).

This case revolves around the interpretation of this clause. The appellant obligates itself to defend its principal and reserves to itself the right to make settlements. These obligations are substantive and impose duties on the appellant. Whether these duties extend beyond the duties which appellant would have as a result of the existence of the Financial Responsibility Bond under the statute in the absence of Clause VIII above is not an issue before the court.

The essence of Lona J. Thornton's claim is that the contract between Glen E. Miller and the defendant-appellant requires the defendant-appellant to negotiate and to settle, if possible, in good faith with claimants, giving due regard to its own interests and the interests of its principal. The essence of the claim of Glen E. Miller is that the defendant-appellant breached its contractual obligation to defend its principal by withdrawing its legal counsel from the case on the day of trial, without so much as a consultation with its principal. The fact that this case involves a Financial Responsibility Bond does not relieve the appellant from its duties to exercise good

faith in securing representation for its principal and obtaining a settlement of the claims against him, more particularly once it had already made efforts to evalute the claim and represent Glen E. Miller. Neither does it relieve the defendant-appellant of an express duty to provide a defense for its principal, especially after it has already undertaken to provide such a defense. The Financial Responsibility Bond is, at the very least, a contract under which the defendant is obligated. The appellees may recover if they fulfill their evidentiary burden and show that the defendant-appellant failed to fulfill its obligation and acted in bad faith. This is consistent with *Fleming v. Parsons, supra,* and the previous holding of this court in *Thornton v. Personal Service Insurance Co., et al.,* No. 2066 (Lorain County, 1973). In *Gedeon v. State Farm Mutual Automobile Insurance Co.,* 410 Pa. 55, 188 A.2d 320 (1963), the court discusses three duties typically owed by an insurer to its insured; (1) the duty to indemnify; (2) the duty to defend; and (3) the duty to handle claims against the insured in good faith. In this case, without deciding whether the duty to indemnify appears in this Financial Responsibility Bond, it is obvious on the face of the contract that the appellant had a duty to defend, and by virtue of reserving the right to settle, it had a duty to handle all claims in good faith. Failure of the defendant-appellant to fulfill its duties to its bondholder gives rise to the liability in this case.

Appellant assigns error as follows:

"1. The judgment in the original case of Thornton v. Logan, et al. was improper and this cannot be a basis for the action of Thornton and Miller against Personal Service Insurance Co.

"2. (A) The trial court erred as a matter of law in overruling defendant-appellant's motion for

judgment made at the conclusion of plaintiff's opening statement.

(B) The trial court erred as a matter of law in overruling defendant-appellant's motion for dismissal of count one of the complaint made following the opening statement of plaintiffs-appellees.

(C) The trial court erred as a matter of law in overruling defendant-appellant's motion for dismissal of count two of the complaint made following the opening statement of plaintiff-appellees.

"3. The trial court erred as a matter of law in permitting the introduction of prejudicial inadmissible evidence.

"4. (A) The trial court erred as a matter of law in overruling defendant-appellant's motion for a directed verdict made at the close of plaintiff's case and renewed at the close of all evidence.

(B) The trial court erred as a matter of law in overruling defendant-appellant's motion for a directed verdict on count one of the complaint made at the close of plaintiff-appellee's case and renewed at the close of all evidence.

(C) The trial court erred as a matter of law in overruling defendant-appellant's motion for a directed verdict on count two of the complaint made at the close of plaintiffs-appellees' case and renewed at the close of all the evidence.

"5. (A) The trial court gave special instructions requested by plaintiff-appellee which did not correctly state the law as applied to this case, over objection by defendant-appellant (T1124-1126).

(B) The trial court read the complaint to the jury as part of its charge to which objection was made (T1132-1142).

(C) The trial court refused to charge the jury on the non-assignability of a bond by the principal (T1171).

(D) The court charged the jury that defendant-appellant was in the insurance business and had agreed to indemnify and save Glen Miller harmless (T1134).

(E) The court charged the jury that Miller had incurred $2,500.00 in expenses although the testimony was contra and there was no testimony regarding reasonableness of the fee charged (T1141).

(F) The trial court charged the jury on compensatory damages for anxiety, nervousness and fearfulness (T1158).

(G) The court charged the jury that liability insurance in the amount of $10,000 was involved (T1149, 1156).

(H) The court charged the jury that a bonding company, an insurance company and a surety were equivalent and had an identical obligation (T1151).

(I) The court charged that withdrawal of counsel constituted breach of contract of insurance giving rise to an action for attorney's fees (T1157).

(J) The court in its charges continuously referred to Glen Miller as the 'insured' and defendant-appellant as 'insurer' (T1148, 1149, 1150, 1152, 1153, 1154, 1155, 1156, 1157, 1159).

(K) The court charged the jury that the relationship between Miller and defendant-appellant was that of 'insurance carrier and insured respectively.' (T1156).

(L) The court charged the jury that in determining the damages of Miller they should take into consideration $178.01 which he had paid in court costs where the testimony was that one-half of that amount had been paid on his behalf (T1158).

(M) The court instructed the jury to award compensatory damages to Glen Miller (T1159).

"6. The verdict is not sustained by the evidence.

"7. The verdict and judgment are contrary to the weight of the evidence."

Assignment of Error #1 constitutes a collateral attack on the judgment of the Common Pleas Court in the original case. The defendant-appellant had the opportunity to represent its interest at that trial and walked away. It attacks the original judgment of a trial court on non-jurisdictional grounds, not having first raised the issue at trial in this case. In fact, defendant-appellant made a considerable effort, during the trial, to avoid the introduction of evidence bearing on the issues in the trial of the original case. "Where a court of record has jurisdiction over the subject matter before it and renders a judgment, such judgment may not be collaterally impeached. So long as it stands unreversed, it remains conclusive as to the matter decided." *State ex rel. Schneider v. Brewer*, 155 Ohio St. 203 (1951) [See also, *McManus v. Buskirk*, 176 Ohio St. 75 (1964); and *State ex rel. City of Mayfield Heights v. Bartunek*, 12 Ohio App. 2d 141

(1967).] The defendant-appellant cannot object to the decision rendered in the original case, and the first assignment of error is not well taken.

Defendant-appellant's second assignment of error is in three parts. It refers to the failure of the trial court to dismiss the plaintiffs' complaint after the opening argument. As this court said in its previous holding [*Thornton v. Personal Service Insurance Co., et al., supra*], The issue of fact of whether the surety's behavior was such as to constitute bad faith is for the jury. The eventual payment or non-payment of the bond limit was never at issue in this case. Rather, the issue was whether the actions of the defendant-appellant taken as a whole constituted bad faith. Therefore, assignment of error 2(A) is not well taken.

Assignment of error 2(B) deals with the assignment of rights made by Glen Miller to Lona J. Thornton. The defendant-appellant raises two issues: (1) whether Glen Miller had any rights, and (2) whether he could validly assign those which he might have. The rights of Glen Miller arose, as a result of the failure of the defendant-appellant to fulfill its obligation to attempt in good faith to settle the claim of Lona J. Thornton and to defend his interests in the original suit. Whether the contract was a bond or an insurance policy does not affect whether Glen Miller had those rights. If the defendant-appellant had specific obligations to Glen Miller, and the jury found that defendant-appellant failed to meet those obligations because of its bad faith conduct, it would be liable to him.

Under his contract to obtain the Financial Responsibility Bond, Glen E. Miller could have two causes of action against his surety. The defendant-appellant could

breach its contractual duty to defend its bond holder and it could breach its duty to deal with all claims against its bond holder in good faith. The allegation in this case is that the defendant-appellant breached both duties. There is no necessity that an insured must have paid a judgment to show damage. By the great weight of authority in this country the entry of judgment itself is the real damage and the cause of action accrues when the judgment is entered. *Gray v. Nationwide Mutual Insurance Co.*, 422 Pa. 500, 233 A. 2d 8 (Pa., 1966); *Crabb v. National Indemnity Co.*, 205 N.W. 2d 633 (S.D., 1973); *Terrell v. Western Casualty and Surety Co.*, 427 S.W. 2d 825, (Ky., C.A. 1968); *Schwartz v. Norwich Union Indemnity Co.*, 250 N.W. 446 (Wisc., 1933); *Jenkins v. General Accident Fire & Life Assurance Corp. Ltd.*, 212 N.E. 2d 464 (Mass., 1965); *Southern Fire and Casualty Co. v. Norris*, 250 S.W. 2d 785 (Tenn. C.A. 1952); *Brown v. State Farm Mutual Automobile Insurance Association*, 272 N.E. 2d 261 (Ill. 4th Dist., C.A., 1971); *Hernandez v. Great American Insurance Co. of N.Y.*, 456 S.W. 2d 729 (Texas, C.A. 1970) and *Critz v. Farmers Insurance Group*, 41 Cal. Rptr. 401 (Cal. 3rd Dist. C.A. 1965). But see, *Dumas v. Hartford Accident and Indemnity Co.*, 26 A. 2d 361 (N.H., 1942) contra.

It is apparent that Glen E. Miller had a claim or claims against his bonding company. The next question is whether he was able to validly assign his claim to plaintiff, Lona J. Thornton.

Cases which were examined hold that such a claim, whether sounding in tort or not, is assignable since it arises out of the contract rights of the insured or is for compensation for damages to one's property or estate. *Comunale v. Traders and General Insurance Company*, 328 P. 2d 198; 68 ALR 883 (Cal., 1958); *General Accident*

Fire and Life Assurance Corp. v. Little, 443 P.2d 690 (Ariz., 1968); *Nationwide Mutual Insurance Co. v. McNulty*, 229 So. 2d 585 (Fla., 1969); *Groce v. Fidelity General Insurance Co.*, 448 P. 2d 554 (Ore., 1968); *Terrell v. Western Casualty and Surety Co., supra; Grundy v. Manchester Insurance and Indemnity Co.*, 425 S.W. 2d 735 (Ky., C.A. 1968); *Landie v. Century Indemnity Co.*, 390 S.W. 2d 558 (Mo., C.A. 1965); *Brown v. State Farm Mutual Automobile Insurance Co., supra* and *Crabb v. National Indemnity Co., supra.*

The final question raised by the defendant-appellant regarding the assignment to plaintiff, Lona J. Thornton, is whether Glen Miller split his cause of action by assigning one claim against the defendant-appellant while retaining a claim against the defendant-appellant for their failure to defend.

The law in Ohio is that where the defendant's wrongful act is single, the cause of action must be single. *Rush v. Maple Heights*, 167 Ohio St. 221 (1958) quoted in *Henderson v. Ryan*, 13 Ohio St. 2d 31 (1968). The defendant-appellant failed to exercise good faith in attempting to reach a settlement of the claim against Glen Miller. This is one cause of action separate and distinct from the claim asserted against it for failure to carry out the contractual duty to defend. [See, *Gedeon v. State Farm Mutual Automobile Insurance Company, supra*].

The assignment to Lona J. Thornton did not split Glen Miller's claim because he had two separate claims for two wrongful acts committed by the defendant-appellant. He made a valid assignment of one of these claims. Since both claims were asserted against the defendant-appellant at the same time during the same trial, any defect would have been only technical and the defendant-

appellant could not possibly be prejudiced. [See, *Groce v. Fidelity General Insurance Co., supra*]. Therefore, assignment of error 2(B) is not well taken.

Assignment of error 2(C) is patently untenable. The plain language of section VIII of the bond application clearly obligates the defendant-appellant to defend its bond holder in the same way insurance companies assume such obligations. In addition, defendant-appellant undertook to investigate the claim for two years, and having refused to negotiate with Lona J. Thornton, filed the answer for Glen Miller, obtained legal representation for him when he was deposed, and represented to him, by word and deed, that their attorney would act as his counsel. If the jury found that this company wrongfully refused to defend its bond holder, he is entitled to recover his expenses, including reasonable attorney's fees in defending the action. *Motorists Mutual Insurance Co. v. Trainor*, 33 Ohio St. 2d 41 (1973); *Socony-Vacuum Oil Co. v. Continental Casualty Co.*, 144 Ohio St. 382 (1945).

There is no doubt that an attorney who withdraws from a case without notice to his client is committing a wrongful act. The code of professional responsibility DR 2-110(A) (2) reads:

> "In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable law and rules."

In *Motorists Mutual Insurance Co. v. Trainor, supra*, at page 47, the Supreme Court says "when an insurer

acts in good faith and considered the welfare of the insured as well as its own, there is no real substantial conflict of interest," citing 1 Long, *Law of Liability Insurance*, Section 5.06 and *Farm Bureau Mut. Auto. Ins. Co. v. Violano*, 123 F. 2d 692 (2d Cir. 1941), *cert. den.* 316 U.S. 672. Where the insurance company has the duty to defend its insured, the attorney so employed has two clients and he owes each equal treatment [See, *Netzley v. Nationwide*, 34 Ohio App. 2d 65 (1971)]. The application for a bond obligates the defendant-appellant to provide such a defense. The defendant-appellant does not deny that the attorney withdrew at its direction on the day of trial, and it remained a question of fact for the jury to decide whether the plaintiff, Glen Miller, was damaged thereby.

In assignment of error number 3 it is claimed that *certain* evidence introduced at trial was improperly admitted. No legal authority is cited to support this argument.

Mr. Swetland testified on the handling of claims and other insurance company procedure. This is an area in which he was undeniably an expert.

The evidence relating to the injuries of Lona Thornton were introduced to demonstrate that the bond company had ample reason to settle the original action for the limit of its coverage. Finally, the case of *Carter v. Bernard*, 27 Ohio Misc. 165 (1971) was admitted into evidence to impeach the defendant's witness. None of these are improper and no error is demonstrated by the defendant-appellant.

Assignment of error number 4 is a restatement of assignment of error number 2 made applicable to the close of the presentation of evidence. Where an issue of fact is in dispute, it is not proper for a trial court to direct a verdict. The plaintiffs in this case presented evidence

that the bonding company had failed to fulfill its duties under the contract involved and that Glen Miller had been damaged thereby. The defendant denied that some of these events had occurred and that Glen Miller had been damaged. The resolution of these issues was for the jury and a directed verdict would have been improper.

Assignment of error number 5 deals with the charge to the jury.

5(A) objects to portions of the charge. As previously discussed, for purposes of the issues raised by this case, the bond in question is essentially an insurance policy in that the duty to use good faith and the duty to defend are analogous. The instruction objected to is the instruction taken directly from *Slater v. Motorists Mutual Insurance Co.*, 174 Ohio St. 148 (1962). This is the test of good faith in an action by an insured against his insurer and as such is applicable to this case. It is entirely proper for the trial judge to use the *Slater* test as his instruction. *Wasserman v. Buckeye Union Casualty Co.*, 32 Ohio St. 2d 69 (1972).

5(B) assigns error under Civil Rule 8(G) in that pleadings shall not be read or submitted to the jury. The trial judge read the pleadings in this case. In view of the circumstances in this case and the evidence presented at trial, the defendant-appellant was not prejudiced by this reading.

Assignment of error 5(C) objects to the failure of the trial court to instruct on the non-assignability of a Financial Responsibility Bond. Since the assignment involved here was not that of the bond itself, but of Glen Miller's claim arising out of the failure of the defendant-appellant to fulfill its good faith contractual obligations, the defendant-appellant had no right to the instruction

which it desired and assignment of error 5(C) is not well taken.

Assignment of errors 5(D), 5(G), 5(H), 5(I), 5(J), and 5(K) all involve the arguments by the defendant-appellant distinguishing between a financial responsibility bond and liability insurance. For the purposes of the two issues in this case, the differences which exist are not relevant. The issues of whether the defendant-appellant owed its bond holder a good faith effort to reach a settlement of this case, and whether it fulfilled the requirement to defend contained in Section VIII of the bond application, are not affected at all by the jury instructions using the words "insurance, insured or indemnify" and the inclusion of those words in the charge did not prejudice the defendant-appellant. These assignments of error have no merit.

Assignment of error 5(E) objects to the charge made by the court as to the expenses incurred by Glen Miller in his defense and the lack of evidence as to the reasonableness of these expenses. The attorney for Glen Miller testified as to his fees. From this record, the trier of the facts could certainly have found that his fees were reasonable, especially in the absence of any evidence to the contrary. This assignment is also without merit.

Assignment of error 5(F) is without merit in that no award for anxiety, nervousness or fearfulness was made by the jury. Therefore, the defendant-appellant was not prejudiced.

Assignment of error 5(L) concerns the court's charge as follows:

> "In determining the amount of his damages, *if any*, which resulted from the failure to furnish his defense, you may and should take into consideration the following elements * * * The court costs, in the amount of $178.01, which he incurred, *if any*." (Emphasis added).

The trial court avoided the error, which the defendant-appellant ascribes to it, by twice qualifying his charge with the words "if any." The charge was, therefore, not contrary to the testimony at trial and was not prejudicial to the defendant-appellant.

Assignment of error 5(M) asserts that the court instructed the jury to find compensatory damages for Glen Miller. Any error, which might have occurred in the cited passage, was corrected by the judge when he made clear that it was for the jury to determine if compensatory damages are due. No prejudice is shown in this assignment of error.

Assignments of error numbers 6 and 7 are considered collectively. Where the evidence in a case is conflicting, or where reasonable minds might differ, the Court of Appeals cannot, as matter of law, find the facts otherwise than found by the trier of the facts. *State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303 (1948); *Ohio Casualty Insurance Co. v. Landon*, 1 Ohio App. 2d 317 (1961). A judgment will not be reversed as against the weight of the evidence if it is supported by competent, credible evidence, 3 O. Jur. 2d Appellate Review §820.

There is evidence that the defendant-appellant consciously refused to settle the original action even though it knew that the liability involved was far in excess of its own bond. The second syllabus in *Slater v. Motorists Mutual Insurance Co., supra*, reads:

> "A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of con-

crete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."

Certainly, the admissions of the defendant-appellant show a conscious and wilful disregard of its bond holder's interest in failing to settle the original case. It is undisputed that the defendant-appellant secured the withdrawal of the attorney from the original case in his representation of plaintiff-appellee, Glen Miller. This is sufficient credible evidence to support the verdict of the jury, and these assignments of error are not well taken.

Plaintiffs-appellees' cross-appeal asserts that:

"The trial court erred in failing to correct the amount of compensatory damages to Lona J. Thornton from $10,000 to $65,000."

Compensatory damages are measured by the actual loss and are equal to that which will make the plaintiff whole. *Pryor v. Webber,* 23 Ohio St. 2d 104 (1970). In situations where an insurer's bad faith "failure to settle" with the injured party is established, the insurer is liable to the insured for the amount which the latter would be required to pay in satisfaction of the judgment. (See, 40 ALR 2d 168). The widely recognized measure of damages in a "failure to settle" case is the amount by which the judgment in the case exceeds the limits of the policy for which the insurer could have settled. [See, 7A Supp. Appleman, Insurance Law and Practice, §4711, at 401; *Herges v. Western Casualty and Surety Co.,* 408 F. 2d 1156 (8th Cir. 1969); *Bush v. Allstate Insurance Co.,* 425 F. 2d 393 (5th Cir. 1970), *cert. den.* 400 U.S. 833, *rehearing*

denied 400 U.S. 985; *Gilley v. Farmer,* 485 P. 2d 1284 (Kan., 1971); *Yelm v. Country Mutual Insurance Co.,* 123 Ill. App. 2d 401, 259 N.E. 2d 83 (3d Dist. C.A. 1970); *Bollinger v. Nuss,* 449 P. 2d 502 (Kan., 1969); *Terrell v. Western Casualty and Surety Co., supra*; and *Clark v. Hartford Accident and Indemnity Co.,* 457 S.W. 2d 35 (Tenn., 1970)].

The jury awarded $10,000 in compensatory damages. Glen Miller was actually damaged in the amount of $65,000 ($10,000 less than the judgment paid by the defendant-appellant in the personal injury case against him). As a matter of law, the plaintiff (cross-appellant) was entitled to an award of damages equal to the amount by which the judgment rendered in the original case exceeded the coverage of the financial responsibility bond issued by Personal Service.

We find, as a matter of law, that plaintiff was entitled, under the circumstances to compensatory damages in the sum of $65,000. The jury awarded $10,000 compensatory damages and $55,000 punitive damages. We are of the further opinion that the plaintiffs-appellees' cross-appeal is well taken to the extent that the judgment must be modified to conform to the facts. We, therefore, modify the judgment to read $65,000 compensatory damages, in lieu of the jury award of $10,000 compensatory damages and $55,000 punitive damages.

The judgment is modified, and affirmed as modified.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this journal

entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Exceptions.

/s/ WILLIAM H. VICTOR
Presiding Judge for the Court

VICTOR, *P.J.*, concurs.

MAHONEY, *J.* concurs in the judgment only.

I concur in the judgment only since I feel that substantial justice has been done in a case involving some reprehensible insurance company action with regard to settlement of this claim and the providing of a defense to its bond holder.

The question of whether Miller could lawfully assign part of his claims against the insurer is one of first impression in Ohio as far as I can ascertain. As a general rule, the test of assignability of claims sounding in tort has been whether it survives the death of the injured party. At common law, injuries to person or property or arising out of fraud and deceit did not survive. However, under R.C. 2305.21, they do survive in Ohio. Despite the general rule as to its assignability, I do not feel that actions such as this should be assignable, especially piecemeal as we had here. I feel that permitting these partial assignments in this type of case leads to a fragmentation of cases and a splitting of causes of actions. They could very easily lend themselves to fraud or collusion.

Therefore, in this case I would hold the claims were not assignable. However, since the claims have been litigated and a retrial would not change the parties or facts, I would conform the pleadings to the facts proven, or I would find Thornton is a trustee for the fund. Then by interpleader, Thornton would still be entitled to a recovery to the extent of her judgment against Miller.

The court's decision here shifts the jury award of punitive damages to compensatory damages to make up the amount the jury should have returned as a verdict under the court's instructions as to the measure of damages. Such a shift is predicated upon an assumption of error by the jury in its return of the verdicts. The court leaves nothing for punitive damages. Under the Slater case in Ohio, punitive damages are certainly an element to be considered by the jury. I would hold that an award of $55,000 punitive damages was manifestly against the weight of the evidence in this case. This is in view of an award of $65,000 compensatory damages, which is over five times the exposure the company had under its policy had it adhered to its contractual obligations. I would make an award of $5,000 punitive damages under the facts of this case.

JUDGMENT ENTRY OF THE COMMON PLEAS COURT

No. 75831-72

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

LONA JEAN THORNTON,
Plaintiff,

VS.

THE PERSONAL SERVICE INSURANCE COMPANY,
Defendant.

This day came the parties by their attorneys and are at issue. Also came the Jury heretofore impaneled and sworn, and the trial again proceeded. And the said Jury again retired to their room in charge of the Bailiff for continued deliberation. Afterwards came said jury, conducted into open Court by said Bailiff, with their Verdict in writing, signed by each concurring Juror in the words and figures following, to wit:

VERDICT FOR PLAINTIFF

Court of Common Pleas, Lorain County, Ohio

April Term, A.D. 1974

LONA JEAN THORNTON
Plaintiff

vs.

THE PERSONAL SERVICE INSURANCE COMPANY
Defendant

No. 75831-72

We, the Jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendant the said Personal Service Insurance Company, Compensatory Damages, at the sum of ($10,000.00) Ten Thousand and 00/100 Dollars.

* * * * *

VERDICT FOR PLAINTIFF

Court of Common Pleas, Lorain County, Ohio

April Term, A.D. 1974

LONA JEAN THORNTON
Plaintiff

vs.

THE PERSONAL SERVICE INSURANCE COMPANY
Defendant

No. 75831-72

We, the Jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the defendant the said Personal Service Insurance Company, Punitive Damages, at the sum of ($55,000.00) Fifty-five Thousand and 00/100 Dollars.

And we do so render our verdict upon the concurrence of members of our said Jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 27th day of August 1974.

• • • • •

VERDICT FOR PLAINTIFF

Court of Common Pleas, Lorain County, Ohio

April Term, A.D. 1974

GLEN E. MILLER
Plaintiff

vs.

THE PERSONAL SERVICE INSURANCE COMPANY
Defendant

No. 75831-72

We, the Jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendant the said Personal Service Insurance Company, Compensatory Damages, at the sum of ($3,500.00) Three Thousand Five Hundred and 00/100 Dollars.

• • • • •

VERDICT FOR PLAINTIFF

Court of Common Pleas, Lorain County, Ohio

April Term, A.D. 1974

GLEN E. MILLER
Plaintiff

vs.

THE PERSONAL SERVICE INSURANCE COMPANY
Defendant

No. 75831-72

We, the Jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendant the said The Personal Service Insurance Company, Punitive Damages, at the sum of—None—Dollars.

* * * * *

IT IS CONSIDERED BY THE COURT that said Plaintiff, LONA J. THORNTON recover from the said Defendant, PERSONAL SERVICE INSURANCE CO. the said sum of Sixty-five thousand ($65,000) together with her costs herein expended, and judgment is hereby rendered in favor of the said LONA J. THORNTON and against PERSONAL SERVICE INSURANCE CO. for such amount.

IT IS CONSIDERED BY THE COURT that said Plaintiff, GLEN E. MILLER recover from the said Defendant, PERSONAL SERVICE INSURANCE CO. the said sum of Three thousand, five hundred ($3,500) together with his costs herein expended, and judgment is hereby rendered in favor of the said GLEN E. MILLER and against PERSONAL SERVICE INSURANCE CO. for such amount.

* * * * *